IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

FRIDAY, THE 14TH SEPTEMBER 2007 / 23RD BHADRA 1929

MFA.No. 240 of 2001()
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AGAINST THE JUDGEMENT/ORDER IN CP.38/1998
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APPELLANT:
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EXCEL GLASSES LIMITED, PATHIRAPALLY P.O., ALAPPUZHA-688 521.

BY ADV. SRI.M.PATHROSE MATHAI
SRI.SAJI VARGHESE

RESPONDENTS:
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GUJARAT HEAVY CHEMICALS LIMITED, BHIKUBHAI CHAMBERS, SWASTIK SOCIETY, NAVARANGPURA, AHMEDABAD-380 009.

BY

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 23/8/2007, THE COURT ON 14/9/2007 DELIVERED THE FOLLOWING:

**Kurian Joseph**
**&**
**T.R. Ramachandran Nair, JJ.**

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**M.F.A.NO.240 of 2001**

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**Dated this the 14TH day of September, 2007**

**JUDGMENT**

**T.R. Ramachandran Nair, J.**

This appeal is filed by the appellant who was the respondent in C.P.No.38/1998. As per the impugned order, the appellant company is directed to pay interest at 12% from 13.10.1997 on the outstanding balance amount till discharge of the entire liability and to pay the same on or before 20.3.2001, to avoid the winding up order. It is further ordered that if the appellant fails to deposit the amount, the petition will be proceeded with, permitting the petitioner to advertise the winding up petition.

2. The application is one filed under Sections 433 and 434 of the Companies Act for winding up the appellant company. The petitoiner in the company petition used to sell soda ash to the appellant. An amount of Rs.46,09,968.47 was finally due and there was a demand to pay the same with interest at 24%. In reply, the appellant company had admitted the liability for the principal amount but disputed the claim for interest. It is in

these circumstances the company petition was filed. During the pendency of the petition, the principal amount was paid in instalments and what remained was the liability for payment of interest. The appellant had filed a counter statement disputing the said liability.

3. Even though the appellant contended that there is no liability to pay interest and further relied upon various decisions for the position that the liability for interest cannot be decided in the company petition, the learned Single Judge proceeded to decide the same after holding that the parties need not be relegated to civil court.

4. Mr. Pathrose Mathai, learned Senior counsel appearing for the appellant contended that the view taken by the learned Single Judge is totally unsustainable. There was a bonafide dispute regarding the liability to pay interest. The amount due to the petitioner company was arrived at after settlement of accounts between the parties and the sum of Rs.46,09,968.47 was finalised as the amount thus due and there was no stipulation in the settlement to pay any interest on the said amount. It was also pointed out that the contract Ext.R1 is the basis upon which the parties proceeded with; the same being a purchase order. Therein, there was no term or condition for payment of interest. It was also pointed out that the

reliance placed by the respondent herein to claim interest was on the basis of endorsements on reverse side of the invoice but that was not part of the contract between the parties. At any rate, it was contended that since there was a bonafide dispute as regards the liability itself, the company court had no jurisdiction to decide the matter. Reliance was placed on the decisions, viz. **Multimetals Ltd. v. Suryatronics Pvt. Ltd.** ((Vol.89) Company Cases 259), **Bombay Glass Blowing Industries v. Bio Vaccines Pvt. Ltd.** ((Vol.98) Company Cases 174) and **Tata Iron and Steel Co. v. Micro Forge (India) Ltd.** ((Vol.104) Company Cases 533).

5. Learned Single Judge found against the appellant for the reason that as per commercial practice, delayed payment will always invite a liability for interest. It was also found that even though the petitioner company was prepared to accept the amount without a claim for interest as on 13.10.1997, the amount had not been paid even after the lapse of one year and as the company court had permitted payment in instalments, the liability for interest must also be settled without directing the parties to approach a civil court.

6. We find force in the submission of the learned Senior Counsel for the appellant that when the liability itself was disputed, the company court

was not justified in directing payment of interest. The purchase order (Ext.R1) did not provide for any liability for interest. The appellant had disputed the claim for interest in the counter statement based on this aspect also. When the claim was settled between the parties by fixing the amount as Rs.46,09,968.47, there was no stipulation therein to pay interest on the amount arrived at in the settlement of accounts. These are aspects which evidence a bonafide dispute as regards the liability to pay interest. Therefore, the question is whether the company court was right in directing payment of interest even though at a reduced rate of 12% from the date of reconciliation, viz. 13.10.1997.

7. In (Vo.l.89) Company Cases 259, Andhra Pradesh High Court in similar circumstances, took the view that "it is well settled that winding up proceedings are not an alternative for recovery of money for which a civil suit is ordinarily the remedy. It is also well settled that for claiming winding up, the creditor has to establish that the respondent owes a definite and ascertained amount to it and that it has failed to pay the same in spite of reminders. The company court cannot be used as a forum by the creditor to establish its rights either regarding the debt or regarding the interest." In (Vol.98) Company Cases 174, the same court expressed the view that "the

claim based on unascertained and indefinite amounts, is not a matter to be considered for dissolution of a company, because, the company court has either to allow or disallow the petition, but has no jurisdiction to pass an order directing to pay the claim amount including an unascertained and indefinite amount of interest because it is the function of a civil court to award interest and, under these circumstances, on the mere ground of multiplicity of proceedings, it cannot be considered for issuing such a direction." In (Vol. 104) Company Cases 533, it was held by the Gujarat High Court in similar circumstances that "it is a settled proposition of law that in a case of disputed debt or a disputed question of fact, the company court would stay its hands and it would be for the parties to get the dispute adjudicated in a competent civil court as it would require leading of evidence, documentary as well as oral, and appreciation of the same, which is the domain of the original civil court. Where there is a bonafide dispute, the company cannot be said to have neglected to pay on a statutory demand."

8. We agree with the above proposition of law accepted in the above cases. Here, it is a case where there is a bonafide dispute as to the liability to pay interest. It is well settled that in such cases, the company court

cannot adjudicate the issue and direct, as in this case, payment of interest. It is a matter for decision by a competent civil court after analysing the evidence both oral and documentary. In that view of the matter, the order under appeal is set aside and the appeal is allowed. No costs.

**(Kurian Joseph, Judge.)**

**(T.R. Ramachandran Nair, Judge.)**

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**Kurian Joseph**
**&**
**T.R. Ramachandran Nair, JJ.**

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**M.F.A.NO.240 of 2001**

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**JUDGMENT**

**September, 2007**